USDA

UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF INSPECTOR GENERAL

Washington D.C. 20250

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Mr. Jeffrey M. Senger
Deputy Senior Counsel for Dispute Resolution
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4328
Washington, D.C. 20530

Subject: Federal ADR Council Subcommittee Report on the Reasonable Expectations of Confidentiality Under the Alternative Dispute Resolution Act of 1996

Dear Mr. Senger:

The Office of Inspector General, U.S. Department of Agriculture (USDA) appreciates the opportunity to comment on the Federal ADR Council Subcommittee's Report on the Reasonable Expectations of Confidentiality Under the Alternative Dispute Resolution Act of 1996 (Report). 65 Fed. Reg. 59200 (Oct. 4, 2000). Our comments and suggestions follow:

1. The Alternative Dispute Resolution Act of 1996, 5 U.S.C. § 571-584 (ADR Act), requires a neutral to "make reasonable efforts to notify the parties and any affected nonparty participants of the demand" for disclosure of ADR communications via a discovery request or other legal process. See 5 U.S.C. § 574(e). COMMENT: The Report should indicate that there are exceptions to this requirement, such as where a court order is issued under seal or there is a law enforcement basis (such as an undercover inquiry) for precluding a neutral from notifying a particular party or all parties to the mediation.

2. The ADR Act (5 U.S.C. § 574(b)(3)) allows release where the specified information "has already been made public." The Report's Section-by-Section Analysis interprets this to include a communication that "has been discussed in an open meeting." Report at 15. COMMENT: What does the term "open meeting" include? Must it be a meeting open to the **public**? Can it just be any meeting that involved persons **in addition to** the parties involved in the mediation session at issue?

3. The answer to Question 15 in the "Question & Answers" section of the Report discusses requests by federal agencies for ADR communications. The Report recommends, "Procedures should be established for access to information that recognize the importance of confidentiality in dispute resolution processes and protect the integrity of the agency's ADR program." Report at 18. COMMENT: If possible, this statement should be clarified to specify what types of procedures are anticipated.

In this same section, the Report requires requesting entities to "seek confidential information only after other potential sources have been exhausted." Id. COMMENT: There must be a reasonableness element to this mandate. Requiring agencies to exhaust **every possible** source before going to the neutral is unreasonable.

The Report also states, "If a federal employee party or neutral receives a request for disclosure, he or she should contact the agency's ADR program as soon as possible to discuss appropriate courses of action. Neutrals must also notify parties of any such request (See Question 19)." Id. COMMENT: Again, there may be circumstances under which a federal employee party may not want the agency's ADR program to be notified immediately of the request. Adding a "where appropriate" qualification would resolve this concern.

4. The answer to Question 16 states, "Parties may agree to **more,** or less, confidentiality protection for disclosure by the neutral or themselves than is provided for in the Act." Id at 19 (emphasis added). COMMENT: This appears to allow parties to agree that their communications cannot be disclosed under **any** circumstances. Such an interpretation is inconsistent with, and thereby vitiates, the ADR Act exceptions allowing for release under specified circumstances.

5. The "Model Confidentiality Statement for Use by Neutrals" states in the second paragraph, third sentence, "Under rare circumstances, a judge can order disclosure of confidential information." Id. at 23. COMMENT: Using the word "rare" is extreme; using "certain" would be better.

6. The Report should consider the implications of section 574(a)(4). This section allows disclosure of ADR communications under a court finding that disclosure is necessary to "prevent harm to the public health or safety" (574(a)(4)(C)). There are three related issues. First is whether a mediation participant can disclose ADR communications unilaterally, where he or she has been subjected to a threat of physical harm during a mediation session. Many State mediation privilege statutes authorize such disclosures. See *The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1, n. 323-324 (1995). Second is whether communications indicating ongoing or future criminal activity may be disclosed (similar to the attorney/client "crime-fraud" exception). Third is whether a "duty to warn" exists between the neutral and the public, similar to the duty to warn that has developed in tort law involving the psychotherapists/patient relationship. *Id.* at n. 327. See *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

The ADR Act should be read to authorize disclosure in all three circumstances. Such an interpretation is consistent with the Act's provision authorizing disclosure to "prevent harm to the public health or safety." Moreover, this interpretation does not conflict with the ADR Act's requirement that a court order be issued in order to **require** a neutral to disclose such information. Finally, such an interpretation would certainly be in the public interest. See generally *The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1.

7. Finally, with respect to the interplay between the ADR Act and statutes granting federal agencies access to records, it is important to emphasize that too broad an interpretation of confidentiality under the ADR Act would inappropriately overturn a multitude of information access statutes, including but not limited to the Inspector General Act, 5 U.S.C. app. 3, § 6(a).

Thank you again for the opportunity to provide these comments.

Sincerely,

Katherine R. Gallo

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